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Summary record of the 660th meeting
Held at the Vienna International Centre, Vienna, on Wednesday, 26 May 1999, at 2 p.m.

Chairman: Mr. Renger ..... (Germany)

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Privately financed infrastructure projects (*continued*)

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The meeting was called to order at 2.10 p.m.

Privately financed infrastructure projects (*continued*) (A/CN.9/458 and Add.1-9)

Chapter VII. Governing law (A/CN.9/458/Add.8) (*continued*)

General remarks, and the law governing the project agreement (legislative recommendation 1 and paras. 4 and 5) (*continued*)

1. **The Chairman** said that the text for legislative recommendation 1 suggested at the last meeting by the observer for Canada might be variously interpreted. It might be understood to allow the parties to choose a law other than that of the host country to govern the project agreement. That would bring up the question of private international law.

2. **Mr. Wallace** (United States of America) said that he understood the suggested text in the way indicated by the Chairman. He was happy with the present title of chapter VII and understood "governing law" to refer to choice of law.

3. **Mr. Lortie** (Observer for Canada) said that the suggested text would allow the exclusion of a given law. It would be best to avoid a discussion of the issue of private international law. His text was intended as a kind of compromise, stating a general principle. It would allow for the principle of freedom of contract, without opening up the question of private international law.

4. **Mr. Estrella Faria** (International Trade Law Branch) said that it was not quite clear to the Secretariat what the consequence of the suggested text would be. He understood that it was not the purpose of the text to imply a right of the parties to choose the applicable law, but that was what it did seem to imply. It read as a choice-of-law clause.

5. **Mr. Wallace** (United States of America) said he understood the intention to be to suggest that a legislature could, if it wished, authorize the parties to decide what law or laws would govern the project agreement. It was not necessarily a question of foreign law: the reference might be to a particular body of domestic law. The drafting could be changed: instead of "unless provided otherwise" one could say "unless legislation provides otherwise", leaving the Government to decide.

6. **The Chairman** said he thought that the purpose was to allow the contracting authority to deviate from particular laws.

7. **Mr. Wallace** (United States of America) said that the legislature might decide to give a general authorization establishing what might be called "freedom-of-contract" autonomy in infrastructure project arrangements.

8. **Mr. Estrella Faria** (International Trade Law Branch) said that the Secretariat had tried to avoid addressing choice-of-law issues. It would need clear guidance from the Commission if it wished the recommendation and notes to cover that matter.

9. **Mr. Wallace** (United States of America) said that the Canadian suggestion, which would leave the choice to Governments, seemed to have support.

10. **Mr. Lortie** (Observer for Canada) welcomed the suggestion of the United States representative to use the wording "unless legislation provides otherwise".

11. **Mr. Phua Wee Chuan** (Singapore) said that in practice the debate on governing law might be academic, since in preparing the tendering documents for a project the contacting authority would choose the host country's law as the governing law. It was true that UNCITRAL texts frequently referred to the principle of freedom of contract. But in many countries the law did not state whether or not parties could contract out of domestic law. It might be best to highlight the fact in the notes that the domestic law of the host country might contain obstacles to the implementation of the project agreement and that thought might be given to removing those obstacles.

12. **Mr. Meena** (India) said that if a country wanted investment for the purpose of infrastructure development it had to provide conditions attractive to investors. The Commission should therefore feel free to make recommendations that it considered fair to both sides, and it would be up to the individual countries to change their laws in accordance with those suggestions.

13. **Mr. Estrella Faria** (International Trade Law Branch) said that it seemed to be the Commission's desire to amend recommendation 1 along the lines of the suggestion made by the observer for Canada. The notes, as proposed by the representative of Singapore, would then highlight possible obstacles in the way of a decision by the contracting authority, for instance, to choose the applicable law or agree that particular areas of law would not apply.

14. **Mr. Wallace** (United States of America) said that that would be acceptable, as long as points made in the discussion—for example, regarding freedom of contract—were brought out in the notes.

The law governing contracts entered into by the concessionaire (legislative recommendation 2 and paras. 6-8)

15. **Mr. Wallace** (United States of America) asked whether the Secretariat saw recommendation 2 and the notes as applying, for example, to government guarantees and assurances, to a power purchase or fuel supply agreement between a concessionaire and a municipality or to an agreement between local lenders and the concessionaire.

16. He also raised a minor drafting point concerning paragraph 8 of the notes.

17. **Mr. Lalliot** (France), referring to paragraph 7, drew attention to the fact that a European directive contained a provision concerning the law to govern contracts entered into by concessionaires. That could perhaps be taken into account.

18. **Mr. Choukri Sbaï** (Observer for Morocco) said that paragraph 6 stated that it was common for the concessionaire and its contractors to choose a law that was familiar to them and that in their view adequately governed the issues addressed in their contracts. A disadvantage, to which the notes should refer, was the fact that a local judge might not be familiar with the law chosen or with the precedents involved.

19. He asked for clarification of the last sentence of paragraph 6. The concessionaire would in fact be obliged to apply local law to local customers.

20. **Mr. Kashiwagi** (Japan) said that he had difficulty in understanding the suggestion in the first sentence of paragraph 8 that the concessionaire's contractors might be regarded as agents of the contracting authority. He also wondered whether the expression "subsidiary liability" in the second sentence meant "vicarious liability".

21. **Mr. Estrella Faria** (International Trade Law Branch) said, in reply to the United States representative, that it had not been intended to exclude local lenders in paragraph 6. However, there might be limitations in a particular jurisdiction; some jurisdictions might object to the choice of any law other than that of the host country in such circumstances. If it was desired, express reference to local lenders or contractors could be made.

22. Power purchase and fuel supply agreements would often be entered into with government-owned agencies. In some legal systems, including a choice-of-law clause in such agreements would raise concerns similar to those raised by a choice-of-law clause accepted by the contracting authority itself, but the situation might depend on whether the entities concerned were treated as government agencies or as commercial enterprises operating under ordinary commercial law.

23. The treatment of government guarantees might depend on the nature of the guarantee. All those matters could be dealt with in the notes, but would need a rather elaborate discussion.

24. In reply to the Japanese representative's question on paragraph 8, he explained that in some civil law jurisdictions, because the project agreement was an agreement entered into under administrative law, subcontractors would normally be considered agents of the contracting authority and be covered by a particularly strict liability regime applicable to government agencies. The explanation in the notes was somewhat compressed. "Subsidiary liability" in that context was not exactly the same as "vicarious liability".

25. In reply to the observer from Morocco, he said that it was not the intention to suggest that the project agreement would authorize the concessionaire to impose a foreign law on its customers. The host country's conflict-of-law rules would apply, and they might limit the possibility of applying any law other than that of the host country in the circumstances. That point could be made clear in the text.

Legislative recommendation 3 and paragraphs 9-16 of the notes

26. **Ms. Nikanjam** (Islamic Republic of Iran) drew attention to the reference to international law in the second sentence of paragraph 10 of the notes. She believed that domestic law in all legal systems provided appropriate legal protection for investors, and wondered what further protection would be provided by international law.

27. **Mr. Zanker** (Australia) said that paragraph 11 of the notes seemed to be more related to bilateral investment promotion and protection agreements than to legislation. But migration, import control and foreign exchange legislation might need amending to encourage investment, and might not require a treaty of any kind. Perhaps the discussion should be moved to section D.

28. **Mr. Mazini** (Observer for Morocco) said that the last sentence of paragraph 16 as currently drafted seemed to imply that expropriation should be institutionalized as a way of acquiring land needed for a project; such a procedure was in reality exceptional.

29. **Mr. Wiwen-Nilsson** (Observer for Sweden) suggested that a sentence should be added to paragraph 10 to the effect that the protection of investors would include protection of a local concessionaire, to avoid any suggestion that it would apply only to foreign shareholders or foreign lenders.

30. **Mr. Kovar** (United States of America) agreed with what had been said by the observer for Morocco. The potential for misunderstanding of the term "expropriation" had been mentioned at the Commission's last session. Although the draft had been improved, some work was still needed to make it quite clear that what was involved was the normal government ability to acquire land for public projects, and that it did not necessarily concern foreign investment.

31. **Mr. Wallace** (United States of America) proposed the addition of the word "including" after the opening bracket in legislative recommendation 3.

32. He suggested that, in the first sentence of paragraph 12, a reference to the possibility of using property for security should be added.

33. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said he was not sure that recommendation 3 had anything to add in practice. If it was intended to refer to rules of law "particularly" relevant to privately financed infrastructure projects, the wording could be changed accordingly.

34. He agreed with the point made by the Iranian representative on paragraph 10. To avoid confusion, "appropriate compensation in accordance with international law" might be replaced by "fair compensation".

35. **Mr. Meena** (India) said that when the Indian Government wanted private investment for any project it was its own responsibility to acquire the land before it entered into an agreement with the concessionaire. He suggested that paragraphs 15 and 16 of the notes should be amended to recommend that approach.

36. **Mr. Mazini** (Observer for Morocco) said that the wording of paragraph 16 could perhaps be amended to make it clear that expropriation was an exceptional procedure.

37. **Mr. Lalliot** (France) said that recommendation 3 was inappropriate as a legislative recommendation, particularly with regard to the non-exhaustive list of areas suggested.

38. Paragraph 11 mentioned bilateral agreements. Multilateral agreements could also be relevant to the promotion of investment.

39. The reference in the first sentence of paragraph 12 to property laws reflecting "acceptable modern standards" was insufficiently clear and should perhaps be deleted.

40. In connection with paragraph 16, he believed that the solution would be to refer to the purchase of land as the normal approach and to expropriation as the exception. He was in favour of retaining the word "expropriation" because to use another term would be confusing.

41. **Mr. Moreno Ruffinelli** (Paraguay) said that in his country every case of expropriation required the passing of an ad hoc law providing due guarantees for the owners. Paragraph 16 was important and "expropriation" was the proper term.

42. **Mr. Kovar** (United States of America) agreed that the term "expropriation" could be retained. However, the emphasis in paragraph 16 on speeding up the process might imply recourse to procedures that were less than fair. The Secretariat should look at the drafting to guard against such an implication.

43. With regard to the suggestion that there was no need to mention international law in paragraph 10, he believed that the confidence of foreign investors would be undermined without a reference to international legal standards.

44. **Mr. Choukri Sbaï** (Observer for Morocco) said that the term "expropriation" was the appropriate one. In his country expropriation was used solely out of considerations of public interest and was subject to control.

45. Paragraph 10 of the notes referred to "protection from nationalization or dispossession without judicial review and appropriate compensation". It should be stated that both privatization and nationalization were sovereign rights. Compensation, however, could be claimed in the courts. Paragraph 11 referred to "protection from expropriation and nationalization", without qualification; he suggested that those words be deleted.

46. **Mr. Estrella Faria** (International Trade Law Branch) said that paragraphs 10 and 11 should have used the same expression as was employed in paragraph 25 of draft chapter IV (A/CN.9/458/Add.5), which spoke of

"compulsory acquisition ... against the payment of appropriate compensation ... in accordance with the rules in force in the host country and relevant rules of international law". That formulation might remove some of the concerns that had been expressed in the debate.

47. There would be a problem in changing the term "expropriation". Although that term had a negative connotation for some English speakers, other possible expressions were not understood everywhere and raised translation problems. The term "expropriation" as used in the guide was defined in paragraph 25 of chapter IV.

48. **Mr. Lee Yong-shik** (Observer for the Republic of Korea) said, with regard to the reference to international law, that he could agree to the solution suggested by the Secretariat.

49. **Mr. Zanker** (Australia) thought the word "expropriation" could be avoided if one referred to procedures for compulsory acquisition of land needed for infrastructure projects with automatic compensation based on market value.

50. On the question of compensation, he suggested that the wording "prompt, adequate and effective compensation" be used.

51. **Mr. Phua Wee Chuan** (Singapore) said that the Commission should not go into the issue of the standard of compensation but merely indicate that compensation had to be paid.

The meeting was suspended at 3.45 p.m. and resumed at 4.05 p.m.

52. **The Chairman** said that there seemed to be a general understanding that the compulsory acquisition of land might be necessary and that compensation must be paid. There was no point in embarking on a discussion of the standard of compensation.

Intellectual property law (paras. 17-21)

53. **Ms. Nikanjam** (Islamic Republic of Iran) proposed the addition, after the words "Paris Convention for the Protection of Industrial Property of 1883" in the second sentence of paragraph 18, of the words "and its amendments".

54. **Mr. Choukri Sbaï** (Observer for Morocco) suggested the addition of a sentence stating that it would be advisable for the host country to enact criminal law provisions designed to combat infringements of intellectual property rights.

55. **Mr. Wallace** (United States of America) proposed the inclusion of a mention of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), concluded under the auspices of the World Trade Organization, somewhere in paragraph 18.

56. In the statement "International registration of marks under the Madrid Agreement has effect in several countries" in the third sentence of paragraph 19, it might be better to replace "several" by "many".

57. At the end of paragraph 21, reference should perhaps be made to conventions on copyright and to the various national regimes dealing with computer software and hardware.

58. **Ms. Gioia** (Italy) supported the proposal of the United States representative concerning reference to the TRIPS Agreement.

59. She suggested that the third sentence of paragraph 19 should be made more precise, using the same wording as in the second sentence of paragraph 20.

60. **Mr. Estrella Faria** (International Trade Law Branch) said that the World Intellectual Property Organization (WIPO) would be consulted on the appropriate wording.

Security interests (paras. 22-30)

61. **Mr. Wallace** (United States of America) questioned the reference to a "title registration system" in the third sentence of paragraph 23.

62. He suggested the addition of words such as "and therefore might add to costs" at the end of the penultimate sentence of paragraph 24.

63. **Mr. Wiwen-Nilsson** (Observer for Sweden) thought that the reference in the last line of paragraph 30 should be to paragraphs 23 to 28, not 24 to 29.

64. **Mr. Lalliot** (France) thought that the discussion of security interests might overlap with chapter IV.

65. Some legal systems did not recognize security interests. While chapter IV treated the issue of security interests in a balanced way, paragraphs 22-30 of the notes in chapter VII were clearly biased in favour of security interests. For instance, the last sentence of paragraph 22 spoke of "a modern regime for secured transactions". Should one conclude that any legal system not allowing for security interests was archaic? He would prefer a more balanced presentation reflecting the fact that some legal systems did not allow for the creation of security interests

in relation to public property, in view of the inalienability of such property.

66. In connection with the words "another form of security typically given in connection with certain privately financed infrastructure projects is an assignment to lenders of proceeds from contracts with customers of the concessionaire" in the first sentence of paragraph 28, he noted that the relationship between concessionaire and customer did not necessarily take the form of a contract in all legal systems. Caution must therefore be exercised in the terminology adopted.

67. **Mr. Wallace** (United States of America) suggested that the wording used in the first sentence of paragraph 33 of document A/CN.9/458/Add.5 might be incorporated in the paragraphs under discussion.

68. Perhaps the reference to "proceeds from contracts" in paragraph 28 could be replaced by a more general reference to accounts receivable or moneys owed.

69. **Ms. Nikanjam** (Islamic Republic of Iran) suggested that the words "different organizations" at the end of paragraph 29 should be amended to "relevant organizations".

70. **Mr. Estrella Faria** (International Trade Law Branch) suggested that to accommodate the concern of the French representative the wording of paragraph 34 of document A/CN.9/458/Add.5 might be used.

71. **Mr. Lalliot** (France) agreed with that suggestion. His concern was that due account should be taken of the diversity of existing legal systems. However, his point about the need to avoid duplication in the guide had not been addressed.

72. **The Chairman** said that some repetition and cross-referencing would be inevitable in the guide.

73. **Mr. Morán Bovio** (Spain) said that paragraphs 22 to 30 of the notes were excellent. Some concerns that had been voiced might be met by the convention on assignment in receivables financing being developed by the Working Group on International Contract Practices.

74. **Mr. Choukri Sbaï** (Observer for Morocco) supported the views expressed by the French representative. Perhaps a sentence could be added to the effect that the contracting authority and the concessionaire might reach an agreement on money or property other than public assets that might be used as security.

75. **The Chairman** said it was understood that the point raised by the French representatives would be taken into account.

Company law (paras. 31-34) and accounting practices (para. 35)

76. **Mr. Wallace** (United States of America) proposed some minor drafting changes.

77. **Mr. Lalliot** (France) said that the statement made in the third sentence of paragraph 35 was hard to understand in the context.

78. **Mr. Estrella Faria** (International Trade Law Branch) said that the sentence was indeed out of place in paragraph 35 and should be removed to another context.

79. **Mr. Choukri Sbaï** (Observer for Morocco) suggested the inclusion in paragraph 35 of a reference to the importance of appointing an auditor.

80. **Mr. Maradiaga** (Honduras) proposed the deletion of the reference to "modern" accounting practices in the second sentence of paragraph 35. To say "internationally acceptable" accounting practices would suffice. He was also unhappy with the drafting of paragraph 31.

81. **Mr. Zanker** (Australia) thought that the word "modern" could be replaced by a better word.

Contract law (paras. 36-37)

82. **Mr. Lalliot** (France) thought that the title "Contract law" was too broad, since the reference was only to contracts concluded by the concessionaire.

83. The wording of paragraph 36 did not adequately take into account the fact that in some countries the contracts concerned might be public contracts rather than commercial contracts. They would not necessarily come under private contract law.

84. **Mr. Estrella Faria** (International Trade Law Branch) suggested that the title of the section should be amended to "Private contract law" and the third sentence of paragraph 36 should refer to "an appropriate private contract law", to make the point clear.

85. **The Chairman** said that that solution seemed to be acceptable to the Commission.

Rules on government contracts and administrative law (paras. 38-41)

86. **Mr. Lalliot** (France) said that he was very happy with the substance of the text.

Insolvency law (paras. 42-44)

87. **Mr. Wallace** (United States of America) wondered what the Secretariat intended to say in the second sentence of paragraph 42. The words "economically viable" could perhaps be deleted.

88. In the second line of paragraph 43, the word "priority" might not be appropriate; perhaps a better wording could be found.

89. **Mr. Lalliot** (France) said that he had the same problem with the words "secured lenders" in the third sentence of paragraph 42 as he had mentioned in connection with security interests. There was also a reference in the last sentence to the principle of party autonomy, this time in connection with the contract between the contracting authority and the concessionaire. The arrangements discussed in the last four sentences of the paragraph would not be applicable in some legal systems. Perhaps those sentences, which repeated points discussed elsewhere in the guide, could be dropped.

90. **Mr. Estrella Faria** (International Trade Law Branch) explained that paragraph 42 had been included as a result of the Commission's request in paragraph 37 of its report on the thirty-first session. The Secretariat felt that the best place for that discussion was in paragraph 42, but of course it could be deleted if the Commission so decided.

91. **Mr. Wallace** (United States of America) suggested that the last sentence of paragraph 42 be retained but transferred to paragraph 6, for example.

The meeting rose at 5 p.m.